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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL LARRY VENEGAS and ROGELIO VELOZ, Defendants and Appellants.	G041958 (Super. Ct. No. 05NF0836) O P I N I O N

Appeals from judgments of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed as modified.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel Larry Venegas.

Michael B. McPartland, under appointment by the Court of Appeal, for Defendant and Appellant Rogelio Veloz.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Gabriel Larry Venegas received a 7-year determinant prison term, plus a consecutive 115-years-to-life indeterminate term and defendant Rogelio Veloz received a 5-year determinate prison term, plus a consecutive 40-years-to-life indeterminate term after a jury found them guilty of several felonies, including conspiracy to commit murder, two counts of attempted premeditated murder, and street terrorism and returned true findings on several punishment enhancements. Both defendants claim the evidence fails to support conviction on the conspiracy charge, and Venegas also challenges the evidentiary sufficiency for one of the attempted murder charges and attacks several evidentiary rulings by the trial court. In addition, both defendants assert the court committed sentencing errors. Finally, to the extent applicable, each defendant joins in the other defendant's arguments.

We conclude defendants' claims relating to the trial court's sentencing rulings have merit and remand the matter with directions to modify their sentences. Otherwise, we affirm the trial court's rulings and the jury's verdicts.

FACTS

Late one evening, a group of males were in an alley of a neighborhood claimed by a street gang named Eastside Anaheim. The alley had graffiti apparently created by Eastside Anaheim members.

A 4-door gray Nissan occupied by four males drove down the alley. The car passed by the group, but then stopped, backed up, and a person later identified as defendant Venegas stepped out of the car from the driver's side rear door. He yelled something about a neighborhood, displayed a gun, and began firing. The group dispersed. Venegas then reentered the car and sped off.

A few minutes later, a police officer on patrol received a radio dispatch about the shooting and saw a Nissan matching the description of the suspect's vehicle. He followed the car and, after other police vehicles joined him, they attempted to stop it. The Nissan accelerated and lead the police on a high speed chase. At one point, the Nissan slowed almost to a stop and Venegas jumped out of car through the left rear passenger door and began running away. A police officer chased Venegas, tackling him.

The Nissan began to accelerate again, but another police car rammed it, ending the pursuit. At that point the Nissan was occupied by defendant Veloz seated behind the wheel, with Freddie Venegas, defendant Venegas's brother, sitting in the front passenger seat, and Jose Acevedo in the back seat.

Diego Alvarez, one of the persons in the alley, was struck by some bullets, but his injuries were not life-threatening. Jonathan Maciel was with Alvarez when the police arrived. The prosecution called Maciel as a witness. He admitted talking to the police, but denied being in the alley when the shooting occurred or recalling any of the incident's details. Maciel also said he told the police he did not see anything and denied recalling that he provided them with details as to what happened and who was involved.

The prosecution was then allowed to introduce Maciel's prior statements to the police on the night of the shooting in which he admitted being in the alley when the shooting occurred and running when the gunman began shooting at the group. He also identified defendants as suspects in the shooting and tentatively identified the Nissan stopped by the police as the vehicle used by the assailants. The jury viewed a tape-recorded interview of Maciel conducted at the police station later that evening.

The police did not recover a gun. But they found five bullet casings in the alley where the shooting occurred and recovered bullet fragments from Alvarez's wounds. The police also tested the hands of all four suspects for gunshot residue, receiving positive results for each of them.

The parties stipulated that Anaheim Vatos Locos (AVLS) was a criminal street gang and that Acevedo was an active AVLS member. They also stipulated that Freddie Venegas was an active member of a street gang named Pauline Street.

Sergeant Bryan Janocha, a 14-year veteran of the Anaheim Police Department assigned to its gang unit for five years, testified as an expert on criminal street gangs for the prosecution. After summarizing his qualifications, Janocha explained gang mores and slang, the use of tattoos, and the importance of weapons in the gang subculture. He also described AVLS, including its approximate size, territory, signs and symbols, and its rivalry with the Eastside Anaheim street gang. Based on police reports, field information cards, and defendants' tattoos, Janocha concluded both Venegas and Veloz were active members of AVLS.

Given a hypothetical question based on the facts of this case, Janocha opined the crimes were committed in association with AVLS "because there [were] multiple A.V.L.S. gang members in the car," and for AVLS's benefit because one report he reviewed indicated "the shooter yelled out A.V.L.S. to let the victims know who is doing it." Janocha also expressed the opinion that the substantive crimes of conspiracy to commit murder, attempted murder, felon in possession of a firearm, and felony evasion were committed to promote, further, or assist criminal conduct by AVLS members because it enhanced the "gang's reputation, respect," and "how much [the] gang [is] feared . . . ."

Venegas testified in his own defense. He admitted being an active AVLS gang member. On the day of the shooting, Venegas claimed he visited his brother, Anthony Venegas, who lived in the area and began drinking alcohol. After his brother

Freddie Venegas arrived, the two continued to drink together. At one point, Freddie Venegas went to his car and was confronted by some men with a gun. Venegas intervened and resolved the dispute, claiming the encounter ended with a shaking of hands. Later, Venegas and Freddie Venegas went to Veloz's home where he and Acevedo were drinking. After drinking some more, the foursome returned to Anthony Venegas's apartment. At some point, the group decided to leave and "cruise around." Venegas claimed that, as they were leaving Anthony Venegas's apartment through the alley, his brother Freddie Venegas "was just . . . getting all crazy" and "just . . . gets off the car and he started shooting." Venegas denied knowing his brother had a gun or that other people were in the alley at the time. He claimed that when the police attempted to stop the vehicle, he fled because "I am on parole and I was . . . scared."

DISCUSSION

1. Sufficiency of the Evidence

Both defendants challenge the sufficiency of the evidence supporting their convictions for conspiracy to commit murder. Veloz claims there was no evidence he drove the car into the alley and drove away after the shooting, or attempted to evade police "based on an agreement . . . to commit murder." Venegas also argues no evidence established he "entered into an agreement with anybody . . . to commit murder." In addition, Venegas challenges the sufficiency of the evidence to support the attempted murder charge that named Maciel as the victim, arguing "while there may have been an intent 'to shoot and . . . disable' some of the participants in the melee, there were no facts from which one could assume the shooter acted with murderous intent, most particularly toward one who was not struck, and who could not say with certainty that the shooter even aimed at him." These contentions lack merit.

The standard of review is well settled. "When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] . . . We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness's credibility. [Citation.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.)

Venegas relies on *People v. Brown* (1989) 216 Cal.App.3d 596, which stated, in reviewing the sufficiency of the evidence to support a conviction, "where the proven facts give equal support to two inconsistent inferences, neither is established. [Citation.]" (*Id.* at p. 600.) We reject this approach. The Supreme Court has held the standard of review expressed in *People v. Lindberg, supra,* 45 Cal.4th 1 applies regardless of whether the prosecution's case is based on direct or circumstantial evidence. (*People v. Towler* (1982) 31 Cal.3d 105, 119.) "Contrary to what defendant suggests, the judgment is not subject to reversal on appeal simply because the prosecution relied heavily on circumstantial evidence and because conflicting inferences on matters bearing on guilt could be drawn at trial. Although the jury is required to acquit a criminal defendant if it finds the evidence susceptible of two reasonable interpretations, one of which favors guilt and the other innocence, it is the jury, not the appellate court, which must be convinced of his guilt beyond a reasonable doubt. [Citation.]" (*People v. Millwee* (1998) 18 Cal.4th 96, 132.)

As for the conspiracy charge, "[a] conviction for conspiracy requires proof of four elements: (1) an agreement between two or more people, (2) who have the

specific intent to agree or conspire to commit an offense, (3) the specific intent to commit that offense, and (4) an overt act committed by one or more of the parties to the agreement for the purpose of carrying out the object of the conspiracy. [Citations.] [¶] The elements of conspiracy may be proven with circumstantial evidence, 'particularly when those circumstances are the defendant's carrying out the agreed-upon crime.' [Citations.]" (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1024-1025.)

Both defendants claim the evidence fails to show an agreement to commit a crime. But "[t]o prove an agreement, it is not necessary to establish the parties met and expressly agreed; rather, 'a criminal conspiracy may be shown by direct or circumstantial evidence that the parties positively or tacitly came to a mutual understanding to accomplish the act and unlawful design.' [Citation.]" (*People v. Vu, supra,* 143 Cal.App.4th at p. 1025.) "The agreement in a conspiracy may be shown by . . . the conduct of the defendants in mutually carrying out an activity which constitutes a crime. [Citations.]" (*People v. Consuegra* (1994) 26 Cal.App.4th 1726, 1734.)

Here, the evidence supported a finding that defendants, both AVLS gang members, along with another AVLS member and fourth person who belonged to another gang, armed themselves with a gun and drove into a rival gang's claimed territory. Upon encountering a group of men in an alley sporting the rival gang's graffiti, Veloz stopped the car, backed up, and waited while Venegas jumped out, yelled something about a neighborhood, and began firing in the direction of the group. Venegas returned to the car, which then sped off. This evidence sufficed to circumstantially establish defendants acted pursuant to an agreement to enter a rival gang's claimed territory, seek out members of that gang, and try to kill one or more of them. As noted, the mere fact the evidence might be consistent with another more innocent explanation of their actions does not render the evidence insufficient to support the jury's verdict.

United States v. Garcia (9th Cir. 1998) 151 F.3d 1243, a case Venegas relies on to support his argument, is distinguishable. There rival gang members attended

a party, during which a fight broke out. As the Court of Appeals explained, the primary issue was "whether testimony regarding the existence of an implicit, general agreement among gang members to support one another in fights against rival gangs can constitute sufficient evidence to support a conviction of conspiracy to commit assault when the conduct of the alleged conspirators is otherwise insufficient." (*Id.* at p. 1244.) Unlike *Garcia*, the evidence in this case shows more than a mere "implicit agreement" between fellow gang members to back up each other.

Venegas's attack on the sufficiency of evidence to support his conviction for attempting to kill Maciel is also unavailing. "Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]" (*People v. Superior Court (Decker)* (2007) 41 Cal.4th 1, 7.) And "it is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.]" (*People v. Smith* (2005) 37 Cal.4th 733, 741.) Further, the Supreme Court has recognized that since "[a]n indiscriminate would-be killer is just as culpable as one who targets a specific person," one "who intends to kill can be guilty of attempted murder even if the person has no specific target in mind." (*People v. Stone* (2009) 46 Cal.4th 131, 140.)

Venegas aimed the gun in the direction of the group of persons in the alley, which included Maciel, and fired the weapon five times from a distance of one to two car lengths. "'The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' [Citations.]" (*People v. Smith*, *supra*, 37 Cal.4th at p. 741.)

Venegas relies on language in *People v. Ratliff* (1986) 41 Cal.3d 675 for the proposition that the "intent to kill cannot be presumed from aiming and firing of a gun." *Ratliff* is distinguishable because it involved the issue of whether the trial court's failure

to instruct the jury that attempted murder required a specific intent to kill constituted harmless error. The Supreme Court held the error was prejudicial, in part noting "[a]lthough it seems clear that defendant had the *intent to shoot* and thus disable his victims, there was no further evidence of a specific *intent to kill* necessary to sustain an attempted murder conviction." (*Id.* at p. 695.) Here, not only did the trial court properly instruct the jury on the mental state needed to support conviction for attempted murder, the evidence supported an inference Venegas was trying to kill members of the group in the alley. (*People v. Brady* (2010) 50 Cal.4th 547, 565 [distinguishing *Ratliff*, found the defendant's mental state established by evidence he repeatedly fired gun at a victim]; *People v. Avila* (2009) 46 Cal.4th 680, 702, fn. 7 [same].)

Nor can Venegas rely on the fact Maciel was not struck by one of the bullets to avoid conviction. "'"The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." [Citation.]' [Citation.]" (*People v. Smith, supra*, 37 Cal.4th at p. 741.) Being a lousy shooter is no defense to attempted murder.

Therefore, we reject defendants' insufficiency of the evidence claims.

2. The Admission of Veloz's Postarrest Statements

a. Background

After his arrest, the police advised Veloz of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]) and he agreed to speak. The police videotaped Veloz's interrogation.

Veloz admitted driving the Nissan the night of the shooting, but claimed the vehicle's only other occupants were Freddie Venegas and Jose Acevedo and they were "[j]ust driving man." He also denied any involvement in the shooting. Veloz said he did

not stop for the police because he "had a suspended license" and "got nervous." The interrogating officer asked if Venegas "was in the back seat next to [Acevedo]," and Veloz replied, "Well[,] I didn't see him." The officer responded, "but when the police stopped you [Venegas] got out of the back seat and ran away. You didn't notice that?" Veloz responded, "Nunhuh." Later, the officer asked Veloz "[w]hen was the last time you saw . . . [Venegas]." Veloz replied "probably yesterday," but then acknowledged "[w]ell just right now . . . when they took us, I seen him right now." He repeated his claim, "I didn't do nothing. I was just cruising, just driving."

At trial, the prosecutor sought to introduce Veloz's entire interview. Venegas's counsel objected to admitting the portions of the interrogation mentioning his client, arguing these references violated the *Aranda/Bruton* rule. (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123, 135-136 [88 S.Ct. 1620, 20 L.Ed.2d 476].) The court overruled the objection and the entire videotape of Veloz's interrogation was played for the jury.

On appeal, Venegas repeats his objection to the admission of the entirety of Veloz's interrogation, arguing "the prosecution's only purpose in playing the tape [of Veloz's interrogation] was to create the impression that Veloz was attempting to cover up for [Venegas], by implication making [Venegas] seem more culpable tha[n] the other occupants of the car." We find no error in this case.

b. Analysis

First, the prosecution sought to admit the interview against Veloz. As such, the interview was admissible under Evidence Code section 1220 as "[e]vidence of a statement . . . offered against the declarant in an action to which he [or she] is a party . . . ." "'The evidence was of statements, defendant was the declarant, the statements were offered against him, and he was a party to the action. Accordingly, the hearsay rule does not make the statements inadmissible.' [Citation.]." (*People v.*

Horning (2004) 34 Cal.4th 871, 898, fn. omitted; see also *People v. Jennings* (2010) 50 Cal.4th 616, 660.)

Contrary to Venegas's claim, the admission of Veloz's statements against Veloz himself did not violate *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. *Crawford* declares that, in criminal cases"[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Id.* at p. 68.) But it has long been recognized "the rationale of [the party admission] exception to the hearsay rule is that the party's right to cross-examine the declarant is not violated since the party himself made the statement." (*People v. Alvarez* (1968) 268 Cal.App.2d 297, 305.)

Nor did the admission of Veloz's postarrest statements violate Venegas's *Aranda/Bruton* rights. To protect a criminal defendant's constitutional right to confrontation, "[t]he *Aranda/Bruton* rule bars admission in a joint trial of one defendant's [otherwise inadmissible] out-of-court confession that powerfully and facially incriminates a codefendant, even if the court instructs the jury to consider the confession only against the declarant. [Citations.] The rule recognizes the jury may struggle to obey such a limiting instruction when both defendants are in the courtroom, tried for the same crime, and an unfair danger exists the jury will improperly consider the hearsay confession against the non-declarant codefendant. [Citation.] To avoid this danger, the court must either sever the trials or redact the statement to avoid references to the codefendant. [Citation.]" (*People v. Smith* (2005) 135 Cal.App.4th 914, 921-922.)

Veloz did not confess to participating in the alley shooting. In fact, he denied any involvement in it. But he did admit to driving the Nissan on the night of the shooting. (*People v. Wheelwright* (1968) 262 Cal.App.2d 63, 69 ["an admission is an extrajudicial statement by . . . the defendant" that " is an acknowledgment of some fact or circumstance which in itself is insufficient to authorize a conviction and which only tends toward the ultimate proof of guilt"].) While Veloz's statements did not amount to a

confession, the *Aranda/Bruton* rule still applies. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1123, superseded by statute on another ground as noted in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 163, fn. 20 ["what is material . . . is not *how* the statement under review should be classified in the abstract—as a confession, an admission, or even an exculpatory declaration—but rather *whether on the facts of the individual case it operates to inculpate the other defendant*"].) Thus, "a nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given. [Citation.]" (*Id.* at p. 1120.)

However, "a defendant's rights under the confrontation clause are not violated by the admission in evidence of a codefendant's confession that has been redacted 'to eliminate not only the defendant's name, but any reference to his or her existence,' even though the confession may incriminate the defendant when considered in conjunction with other evidence properly admitted against the defendant. [Citation.]" (*People v. Fletcher* (1996) 13 Cal.4th 451, 456, quoting *Richardson v. Marsh* (1987) 481 U.S. 200, 211 [107 S.Ct. 1702. 95 L.Ed.2d 176].) Veloz not only denied Venegas was in the car, he also denied seeing Venegas until after his arrest. The only references to Venegas appeared in the interrogating officer's questions.

In *People v. Fulks* (1980) 110 Cal.App.3d 609, the court found *Aranda/Bruton* error when postarrest exculpatory but inconsistent statements made by jointly-tried defendants were admitted "for the sole purpose of being improperly played off against each other so as to demonstrate the collective consciousness of guilt of the three defendants . . . ." (*Id.* at p. 617.) It is true, the prosecution used Veloz's postarrest statements to argue he was lying, thereby reflecting a consciousness of guilt on his part. But Veloz not only denied being present at or involved in the alley shooting, he also claimed the Nissan's only occupants were himself, Freddie Venegas, and Jose Acevedo.

In addition, unlike *Fulks*, Veloz's statements were not played off against Venegas's statements to the police to jointly incriminate each other.

The court instructed the jury that if they found Veloz knowingly made a "false or misleading" statement, it "may consider it in determining his guilt," but could "not consider the statement in deciding . . . Venegas'[s] guilt." "*Bruton* . . . recognized a narrow exception" to the rule that "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant," because it "accords with the almost invariable assumption of the law that jurors follow their instructions . . . ." (*Richardson v. Marsh, supra,* 481 U.S. at pp. 207, 206.) Thus, redaction of a codefendant's statement is permissible when it "[is] not incriminating on its face, and [becomes] so only when linked with evidence introduced later at trial . . . . [¶] Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence." (*Richardson v. Marsh, supra,* 481 U.S. at p. 208, fn. omitted; *People v. Lewis* (2008) 43 Cal.4th 415, 454.) Since Veloz denied both Venegas's presence in the car and his own participation in the shooting, and the only references to Venegas appear through the interrogator's questions, the facts of this case fall within the ambit of the general rule, not the *Aranda/Bruton* rule's narrow exception.

Thus, we conclude the trial court did not err in admitting Veloz's postarrest statements. But, even if the ruling was erroneous, Venegas suffered no prejudice. The sole possible use of Veloz's statements against Venegas arose from the interrogator's inference that he was also in the car on the night of the shooting. Any potential prejudice was blunted when Venegas testified in his own defense acknowledging not only that he *was* in the car, but that a shooting *occurred,* claiming only that it was his brother Freddie Venegas who suddenly fired the gun while heavily intoxicated.

3. Freddie Venegas's Refusal to Testify

a. Background

Freddie Venegas was jointly charged with the same crimes as defendants. Before trial, he pleaded guilty to the charges and was sentenced to prison. By the time of defendants' trial, the time for Freddie Venegas to appeal from his conviction had passed. The prosecution subpoenaed Freddie Venegas to testify at trial.

Before Freddie Venegas took the stand, the court held a hearing outside the jury's presence to determine whether the witness had any privilege to refuse to testify and whether he would be willing to answer any questions. At the hearing, Freddie Venegas was represented by counsel. His attorney informed the court he had discussed the matter with his client, and the only privilege being asserted was the Fifth Amendment privilege against self-incrimination. The court concluded Freddie Venegas no longer held that privilege and could be subject to penalties and sanctions if he refused to answer questions. Freddie Venegas informed the court he would still refuse to do so.

Defendant Venegas's counsel objected to Freddie Venegas being called to the witness stand and refusing to answer any questions in front of the jury, citing "the negative implications that could be drawn from it . . . ." Citing *People v. Lopez* (1999) 71 Cal.App.4th 1550, the court overruled the objection. Thereafter, Freddie Venegas took the stand and was asked if he recalled the night of the shooting, whether he recognized either defendant, and if he was arrested along with them. He refused to answer these questions. The court denied a defense motion for mistrial. Thereafter, Janocha was recalled to the stand and stated testifying is considered a form of "ratting" in the gang culture and would result in the member's loss of respect and reputation.

b. Analysis

On appeal, Venegas acknowledges Freddie Venegas "may not have had a Fifth Amendment privilege" to refuse to testify, but argues "[i]n light of [Freddie

Venegas's] announced intent to refuse to answer questions[] and . . . his familial relationship to [Venegas], it was error to allow the prosecution to put Freddie [Venegas] on the stand simply to make some sort of demonstration about gang loyalties." Thus, he contends, both his right to due process of law and confrontation were violated as a result. Again, we find no error.

The Supreme Court has held "'permitting the jury to learn that a witness has invoked the privilege against self-incrimination serves no legitimate purpose and may cause the jury to draw an improper inference of the witness's guilt or complicity in the charged offense.' [Citations.] . . . [W]e have noted that '"it is the better practice for the court to require the exercise of the privilege out of the presence of the jury."' [Citations.] We have commended that approach because it operates 'as a means by which to avoid the potentially prejudicial impact of the witness asserting the privilege before the jury.' [Citation.]." (*People v. Smith* (2007) 40 Cal.4th 483, 516-517; see also *People v. Mincey* (1992) 2 Cal.4th 408, 441 ["inferring guilt from the mere exercise of the privilege would be improper and is at best based on speculation, not evidence"].)

But in *People v. Lopez, supra*, 71 Cal.App.4th 1550, we held "where a witness has no constitutional or statutory right to refuse to testify, . . . [j]urors are *entitled* to draw a negative inference when such a witness refuses to provide relevant testimony." (*Id.* at p. 1554.) *Lopez* involved a criminal prosecution of a gang member charged with several crimes, including street terrorism, plus an allegation that he committed one substantive offense for the benefit of his gang. To establish Penal Code section 186.22's pattern of criminal gang activity element, the prosecution called Miranda, another member of the defendant's gang, to testify concerning his, then final, conviction for a prior gang-related offense. During a hearing before testifying, Miranda said he would refuse to answer any questions. The trial court allowed the prosecution to put Miranda on the stand in the jury's presence where he repeated his refusal to answer questions.

We rejected the defendant's claim this procedure constituted error and further agreed Miranda's refusal was relevant to the gang expert's opinion testimony. "[O]nce the trial court was made aware the witness intended to claim a Fifth Amendment privilege, it made the proper inquiries and determined the testimony of the witness would be relevant, and the privilege did not apply. It then ordered Miranda to testify before the jury. Miranda took the stand and refused to answer questions, basing his refusal on a privilege he was not entitled to claim. We find, under these circumstances, that the jury was entitled to consider Miranda's improper claim of privilege against him as evidence relevant to demonstrate exactly what the gang expert had opined: that gang members act as a unit to advance the cause of the gang and to protect their members. This may not have been the purpose for which Miranda was originally called as a witness but it is what he chose to provide, and we see no more reason for excluding it than if he had testified to it directly." (*People v. Lopez*, *supra*, 71 Cal.App.4th at pp. 1555-1556.)

Subsequent cases have followed *Lopez*. In *People v. Sisneros* (2009) 174 Cal.App.4th 142, the appellate court rejected a confrontation clause claim under similar circumstances. "The federal Supreme Court has made it clear that a defendant's confrontation rights apply to testimonial statements offered for their truth. . . . Here, of course, Luna never testified as a witness and never offered any statement, much less a testimonial statement. [¶] As our appellate courts have repeatedly found consistent with the Supreme Court's Sixth Amendment precedent: 'Hearsay in support of expert opinion is simply not the sort of testimonial hearsay the use of which *Crawford* condemned,'" "because 'an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion.' [Citation.]" (*Id.* at pp. 153, 154.)

And in *People v. Morgain* (2009) 177 Cal.App.4th 454, the Court of Appeal found no confrontation or due process violation when the prosecutor relied on a

woman's refusal to testify "to protect her boyfriend and the father of her child. [Citation.]" (*Id.* at p. 468.) "[A]ppellant suggests there was no evidentiary basis for a negative inference because the court struck all of Wallace's testimony, including her refusal—without legal justification—to answer the prosecutor's questions. . . . But it did not strike the fact that she took the witness stand and refused to testify. The act of her unjustified refusal to answer the prosecutor's questions remained before the jury. Accordingly, the court did not err by allowing the prosecutor to argue a negative inference from Wallace's initial willingness to answer questions and her subsequent and unjustified refusal to answer questions about the incident." (*Ibid*.)

The facts of this case present a similar circumstance. Freddie Venegas had pleaded guilty to crimes arising out of the same shooting and was sentenced. The judgment in his case had become final. As a result, Freddie Venegas's "privilege to avoid compelled self-incrimination with regard to the facts underlying the conviction no longer exist[ed]. [Citations.]" (*People v. Lopez, supra,* 71 Cal.App.4th at p. 1554.) His unjustified refusal to testify gave rise to a relevant inference supporting Janocha's opinion concerning the gang subculture's code of refusing to "rat," i.e., cooperate with the authorities by testifying against another gang member. Therefore, the trial court did not err by allowing Freddie Venegas's to be called as a witness and refuse to answer questions in front of the jury.

4. The Gang Expert's Testimony

Venegas attacks Janocha's gang expert testimony on two grounds. First, he challenges the trial court's admission of a statement Alvarez made after the shooting. According to the record, while at the hospital, Alvarez told an investigating officer, "The person that shot me yelled out A.V.L.S., that's what it sounded like to me." During a pretrial hearing, the court overruled a defense hearsay objection to Janocha's use of this statement as a basis for his opinions, and finding that, with the limiting instructions, the

statement's relevance outweighed its potential for prejudice under Evidence Code section 352. On appeal, Venegas claims introduction of Alvarez's statement violated *Crawford v. Washington, supra*, 541 U.S. 36. He asserts it "was plainly admitted for the truth of the matter asserted," and "no jury could possibl[y] follow the convoluted instructions to ignore the statement but then determine if it was true."

This claim lacks merit. Contrary to Venegas's reliance on the general rule excluding the admission of evidence concerning gangs and a defendant's gang membership, "[i]n general, . . . [c]ourts . . . have long permitted a qualified expert to testify about criminal street gangs when the testimony is relevant to the case." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) "Expert testimony repeatedly has been offered to show . . . 'whether and how a crime was committed to benefit or promote a gang.' [Citation.]" (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1550.)

In *People v. Gardelely* (1996) 14 Cal.4th 605, the Supreme Court summarized the governing principles for the use of expert testimony in this context: "Expert testimony may . . . be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. [Citations.] . . . . [¶] So long as th[e] threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion. [Citations.]" (*Id.* at p. 618.) Furthermore, "'[m]ost often, hearsay problems will be cured by an instruction that matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth. [Citation.] [¶] Sometimes a limiting instruction may not be enough. In such cases, Evidence Code section 352 authorizes the court to exclude from an expert's testimony

any hearsay matter whose irrelevance, unreliability, or potential for prejudice outweighs its proper probative value. [Citation.]' [Citation.]" (*People v. Bell* (2007) 40 Cal.4th 582, 608.)

We recognize another appellate court panel has recently criticized *Gardeley*'s holding that allows the limited introduction of out of court statements cited by an expert to support his or her opinion. (*People v. Hill* (Jan. 13, 2011, A117787) ___ Cal.App.4th ___, ___ [2011 WL 117245].) However, under the doctrine of stare decisis, we are bound to follow *Gardelely*'s approach. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

As noted, Alvarez's statement was admitted solely as a basis for Janocha's opinions concerning how the shooting related to the criminal street gang subculture and promoted and benefitted defendants' gang. Before allowing its admission, the court conducted the proper Evidence Code section 352 balancing analysis, finding the statement's probative value outweighed its prejudicial effect. In addition, as Venegas acknowledges, the court also gave CALCRIM No. 360, which instructed the jury that it "may consider [Alvarez's] statement[] only to evaluate the expert's opinion" but not "as proof that the information contained in those statements is true."

Venegas argues CALCRIM No. 360's limitation on the jury's consideration of Alvarez's statement "was cancelled out by CALCRIM No. 318, which gave [the jury] permission to use a witness's prior statement for its truth." Not so. Generally, "the adequacy of [jury] instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In applying this standard, we construe the instructions "'if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ibid*.) Also, "'"[i]n determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and

capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.]" (*Ibid.*)

Insofar as the evidence related what Alvarez told the investigating officer, CALCRIM No. 318 is irrelevant because Alvarez was not a trial witness. Venegas notes he "did testify" in his defense and "the jury . . . would have assumed it could consider the A.V.L.S. comment against [him]." But Alvarez only identified the individual making that statement as "[t]he person that shot me." Venegas's identity as the gunman was established by other evidence. Furthermore, as noted, the court instructed the jury to use the "A.V.L.S." statement only for the purpose of evaluating Janocha's expert opinions, not for its truth.

As for the statement's use to evaluate Janocha's opinions, Venegas alternatively contends CALCRIM No. 332 simply "confuse[d] matters further," citing the portion of that instruction telling the jury "[y]ou must decide whether information on which the expert relied was true and accurate." "[S]o in one instruction the jury was told not to consider that statement for its truth, and in another instruction the jury was told it must determine whether the assumed fact was true."

People v. Felix (2008) 160 Cal.App.4th 849 rejected a similar argument. There the defendant "argue[d] . . . the instruction advises juries to determine the truth or accuracy of matters not presented at trial, and obliges them to speculate or 'perform the impossible.'" (*Id.* at p. 860.) *Felix* disagreed, declaring the "[a]ppellant's contention ignores the sentences immediately preceding and following the [challenged] sentence, as well as other instructions given to the jury. The preceding sentence groups 'information on which the expert relied' with other matters that the expert disclosed *at trial*, namely, the expert's qualifications and reasons for his or her opinions; the following sentence permits the jury to reject expert opinions unsupported by *the evidence.* Moreover, the jury received CALCRIM Nos. 201 and 222, which, respectively, forbid independent investigation and inform the jurors that they "must use only the evidence that was

presented in [the] courtroom." Viewed in context, the sentence . . . challenge[d] directed the jury to examine any 'information on which the expert relied' that was disclosed at trial, and to assess its value on the basis of the evidence admitted at trial." [¶] This task is neither impossible nor improper. . . . [J]uries are properly instructed to assess critically the disclosed factual basis of an expert opinion." (*Ibid*.)

This analysis is equally applicable to this case. Thus, we reject the claim the trial court erred by allowing Janocha to consider Alvarez's statement concerning what the shooter said before firing the gun.

Venegas's second challenge to Janocha's testimony is based on *People v. Killebrew* (2002) 103 Cal.App.4th 644. Citing the fact Janocha expressed his opinions in response to the prosecutor's hypothetical questions, Venegas asserts "[s]imply because the prosecutor referred to [the] recitation of the facts as a hypothetical did not make it so," and thus "[i]t was error to allow Janocha to provide his opinion on the ultimate issue concerning the gang charge and allegations, as well as to comment on the charged offenses as if they had been proven to be true."

This argument is also unpersuasive. Courts have repeatedly held that allowing an expert to "merely answer[] hypothetical questions based on other evidence the prosecution presented . . . is a proper way of presenting expert testimony." (*People v. Gonzalez, supra*, 38 Cal.4th at p. 946; *People v. Gardeley, supra*, 14 Cal.4th at p. 618; *People v. Garcia* (2007) 153 Cal.App.4th 1499, 1513-1514 ["trial court did not abuse its discretion in permitting [gang expert's] testimony, even though the topics as to which he rendered an opinion based on responses to hypothetical questions were, in fact, the ultimate issues of the case"].)

People v. Killebrew, supra, 103 Cal.App.4th 644 is distinguishable. It reversed a gang member's conviction for conspiracy to possess a handgun, finding the expert was allowed to testify to the defendant's "subjective *knowledge and intent*," which constituted "the only evidence offered by the People to establish the elements of the

crime," and "[a]s such, . . . [was] the type of opinion that did nothing more than inform the jury how [the expert] believed the case should be decided." (*People v. Killebrew, supra,* 103 Cal.App.4th at p. 658.) "*Killebrew* . . . merely 'prohibit[s] an expert from testifying to his or her opinion of the knowledge or intent of a defendant on trial.' [Citations.]" (*People v. Gonzalez, supra,* 38 Cal.4th at p. 946.) Janocha's opinion was not the sole basis for the jury's street terrorism verdict and criminal street gang enhancement findings. Thus, Venegas's attacks on the gang expert's testimony lack merit.

5. Sentencing Error Claims

Each defendant attacks certain aspects of his sentence.

As to Veloz, the jury, in part, found him guilty of the attempted premeditated murder of Alvarez with true findings he committed this crime in association with and for the benefit of a criminal street gang (Pen. Code, § 186.22, subd. (b)(1)) and he vicariously discharged a firearm causing great bodily injury (Pen. Code, § 12022.53, subds. (d) & (e)). In sentencing Veloz on these charges, the trial court directed that he serve a minimum 15-year term. (Pen. Code, § 186.22, subd. (b)(5).) Citing Penal Code section 12022.53, subdivision (e)(2) and *People v. Brookfield* (2009) 47 Cal.4th 583, Veloz argues the trial court erred by imposing the 15-year minimum term because the firearm discharge enhancement was based on his vicarious, rather than personal, use of a firearm. The Attorney General concedes Veloz is correct and requests his sentence on count 2 be modified to life with the possibility of parole. We agree.

Both defendants claim the trial court miscalculated their presentence credits, thereby reducing each one's credits by 10 days. The court awarded each defendant 225 goodtime/work time credits and 1,501 actual credits. Although on the record, the court expressly stated each defendant should receive 1,736 days of total credit, the abstract of judgment for each defendant reflects the total credits awarded are 1,726.

Veloz argues this error resulted because "the trial court miscalculated . . . presentence credits" by giving the defendants only 1,501 actual time credits when each one "was entitled to 1,510 days for actual time in custody, plus 226 of conduct credits . . . ." Again, the Attorney General acknowledges "Veloz appears to have performed his computations correctly," and requests that we direct the abstracts of judgment be corrected. We also agree with this conclusion.

In sentencing the defendants for their street terrorism convictions, the court imposed a 4-year concurrent term on Venegas and a 2-year concurrent term on Veloz. Venegas claims the sentence imposed for street terrorism violated Penal Code section 654's prohibition against multiple punishment. We agree.

Penal Code section 654, subdivision (a) declares, "An act or omission that is punishable in different ways by different provisions of law shall . . . in no case . . . be punished under more than one provision. . . ." In *Neal v. State of California* (1960) 55 Cal.2d 11, the Supreme Court recognized that "'[i]f only a single act is charged as the basis of . . . multiple convictions,' . . . the defendant can be punished only once. [Citation.]" (*Neal v. State of California, supra,* 55 Cal.2d at p. 19.) Also, recognizing "[f]ew if any crimes . . . are the result of a single physical act," *Neal* further held Penal Code section 654 applies "'where a course of conduct violated more than one statute,'" declaring "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid*.) Although neither defendant interposed an objection to the court's sentencing on count 5 claiming it amounted to invalid multiple punishment, since a sentence in violation of Penal Code section 654 constitutes an unauthorized sentence, the issue may be raised for the first time on appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

The parties cite several cases that have considered Penal Code section 654's application where a defendant is convicted of street terrorism and other felonies, which reached varying results. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465-1468; *In re Jose P.* (2003) 106 Cal.App.4th 458, 468-471; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935; *People v. Vu, supra,*143 Cal.App.4th at pp 1032-1034; *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1315.) In light of the factual scenario presented here, we conclude *People v. Vu, supra,* 143 Cal.App.4th 1009 presents the most analogous factual situation and reaches the appropriate result.

In *Vu*, the defendant, a gang member, was found guilty of conspiracy to commit first degree murder, murder, and street terrorism. The charges arose from the defendant's participation in the shooting of a person believed to be a member of a rival street gang for the prior killing of one of the defendant's fellow gang members. The trial court imposed a concurrent sentence for the street terrorism conviction, but on appeal we reversed. "Vu committed different acts, violating more than one statute, but the acts of conspiracy and street terrorism constituted a criminal course of conduct with a single intent and objective. That single criminal intent or objective was to avenge [an earlier] killing by conspiring to commit murder. Although that intent or objective could be parsed further into intent to promote the gang and intent to kill, those intents were not independent. Each intent was dependent on, and incident to, the other." (*People v. Vu, supra,* 143 Cal.App.4th at p. 1034.)

Here, the defendants engaged in a course of conduct of driving through a rival gang's claimed territory with the intent of seeking out rival gang members to kill and, by doing so, promote fear and respect for AVLS. Since the conspiracy to kill and attempt to kill rival gang members was the felonious conduct by which defendants promoted AVLS, they acted with but a single intent and objective. We conclude the trial court erred by not imposing and then staying the sentences for each defendant's street terrorism conviction.

DISPOSITION

As to appellant Veloz, the matter is remanded to the superior court with directions to amend the abstract of judgment in the following respects: (1) Delete the 15-year minimum term imposed on count 2 and order the sentence for that count to be life with the possibility of parole; (2) stay the sentence previously imposed on count 5 until completion of the sentence imposed on count 2 with the stay to become permanent upon completion of the sentence on count 2; and (3) amend the section addressing credit for time served, to reflect total credits of 1,736, actual credits of 1,510, and local conduct credits of 226. As to appellant Venegas, the matter is remanded to the superior court with directions to amend the abstract of judgment in the following respects: (1) Stay the sentence previously imposed on count 5 until completion of the sentences imposed on counts 2 and 3 with the stay to become permanent and upon completion of the sentences on counts 2 and 3; and (2) amend the section addressing credit for time served, to reflect total credits of 1,736, actual credits of 1,510, and local conduct credits of 226. Upon the amendment of the abstracts of judgment the trial court is directed to forward certified copies of each abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.